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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 198

JOSEPH PAGANO,

Petitioner,

—v.—

MILTON E. SAHN, as Trustee in Bankruptcy of MURRAY PACKING CO. INC., Bankrupt,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

October Term, 1961

No. .....

Joseph Pagano,

Petitioner,

—v.—

Milton E. Sahn, as Trustee in Bankruptcy of Murray Packing Co. Inc., Bankrupt,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on April 25, 1962.

Citations to Opinions Below

The opinion of the Court of Appeals, printed in the Appendix hereto, is not yet officially reported. The opinion of the District Court for the Southern District of New York is reported in 200 F. Supp. 16 (R. 101a). There is also an opinion by the Referee in Bankruptcy herein (R. 84a).

Jurisdiction

The judgment of the Court of Appeals was made and entered on April 25, 1962 (R. 113a).

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254(1).

Questions Presented

The questions presented are:

1. Whether the judgment of the Court of Appeals directing the petitioner to turn over $745,000 to the respondent trustee in bankruptcy was properly made, notwithstanding the absence of evidence that the petitioner has the power to comply with this order, or that he has present possession of all or any part of this large sum.

2. Whether upon the hearing held on the petition for such turnover order the petitioner had the burden to show that he no longer had possession of any part of such $745,000, notwithstanding his claim of a constitutional privilege against self incrimination.

3. Whether the Referee exceeded his jurisdiction by deciding summarily that petitioner's adverse claim that he received such $745,000 from the corporation as a loan evidenced by his promissory notes was colorable, notwithstanding the evidence that all the directors, officers and stockholders of the corporation consented to and approved such loan.

Statutes Involved

11 U. S. C. §11. Courts; jurisdiction and powers.

"The courts of bankruptcy • • • are invested • • • with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings • • • to • • • (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; • • • make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title; • • •."

11 U. S. C. §46. Jurisdiction of United States and State courts.

"(a) The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this title, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. • • •"

11 U. S. C. §110. Title to property.

"(a) The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy or

of the original petition proposing an arrangement or plan under this title, except insofar as it is to property which is held to be exempt, to all * * * property transferred by him in fraud of his creditors * * *

"(e)(1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor.

"(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whomever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision (e) is valid under applicable Federal or State laws."

Statement of Facts, Material to the Questions Presented

Murray Packing Co. Inc., was a meat and poultry wholesaler in New York City (108a). Petitioner became associated with it in March, 1960, as a salesman (108a). In December, 1960, he bought a third of its stock and became its president (108a). The directors were Gussie Weinberg, Terry Newman and himself (108a). Prior to his election, the corporation's purchases and sales averaged about

$100,000 weekly, but after his election the corporation's purchases and sales increased sharply, the new sales being mostly to customers that he brought (108a).

Between March 20, 1961 and March 29, 1961, while he was president of the corporation, petitioner borrowed $745,000 from it, and gave it his promissory notes to repay such sum in ninety days (18a-42a). He did not repay it (43a).

On April 4, 1961, the corporation made an assignment for the benefit of creditors (66a), and on April 11, 1961, an involuntary petition in bankruptcy was filed against it, and it was adjudged a bankrupt (1a).

On May 5, 1961, a petition was filed for an order directing this petitioner to turn over to the bankrupt estate the sum of $657,000, and directing Stanley Weinberg, Secretary-Treasurer of the corporation, to turn over $88,000, and the petition alleged that these sums were the property of the corporation and in the possession of this petitioner and Weinberg, respectively (1a).

Over petitioner's objection, the Referee decided, after a hearing, that he had summary jurisdiction (56a-59a); that petitioner received both sums from the corporation, and that Stanley Weinberg did not receive any part thereof (88a); that petitioner's claim that he borrowed this money from the corporation was colorable (88a); that his possession of the money within three months before the turnover decision, coupled with his refusal, on grounds of self incrimination, to testify what he did with the money, makes it a fair and reasonable inference that he is presently in possession or control thereof; and that such refusal to testify, on the ground of self incrimination, does not relieve him of his burden to come forward and explain what he did with the money (88a-89a).

Accordingly, on July 24, 1961, the Referee made an order directing the petitioner to turn over $745,000 to the trustee in bankruptcy, and denying the petition against Stanley Weinberg (99a).

On December 5, 1961, the District Court affirmed the said order in so far as it dismissed the petition against Stanley Weinberg, and reversed the said order, in so far as it granted the petition against the petitioner herein, and it dismissed the petition (101a).

On April 25, 1962, the Court of Appeals reversed the District Court's order, in so far as it dismissed the petition against the petitioner herein, and it affirmed the Referee's turnover order directed to the petitioner (106a). That Court approved the Referee's findings that petitioner's claim of a loan was colorable, and it said that petitioner's "claim that testimony would incriminate him cannot be transformed into a plausible assertion of innocence in the acquisition of the monies or an adequate denial of continued possession of them" (112a).

Reasons for Granting the Writ

I

The Referee found that the petitioner admitted receiving the sum of $745,000 from the corporation between March 20, 1961 and March 31, 1961 (92a, 94a), and that he "is in present possession or control" thereof (97a).

There was, however, no evidence whatever that the petitioner was in possession or control of any part of such $745,000 at any time after March 31, 1961. Instead, there was evidence that petitioner no longer had the money and could not repay it, such evidence being an account by Stan-

ley Weinberg, Secretary-Treasurer of the corporation, of a conversation with the petitioner, thus (62a-63a):

"After these checks were signed I had gotten together with my father and Joe Pagano had come up and asked for more money; he said he needed it and I asked him what he did with the first money, and he said that he had lost it; but he was getting it back if he had some more capital.

At the time I got a little frightened about it and I went down and called my father and Mickey but they were on a lower sales level.

I called them and told them I had gotten some money to give Joe some money and they asked me how much and I told them. They got very excited. I said 'that is not all; he wants more now.' So they called Joe in. He was on the street floor. My father at that time got very incensed about it. He said, 'what are you doing? You are taking whatever we have. We have to pay our bills.' And he tried to explain to Joe that we had a very good reputation. We have been in business a long time and always paid our bills, and he has to get the money back for us.

At that time Joe said, 'Look, all this business you got I brought you. That is what is making you a successful business. I need this money right now. I know I can get it back. You know my reputation and background, and my credit is always good with everybody. I just need it for a couple of days.'

At that time they talked it over and we said he has to have it right now; let him have what he needs and by the week-end he will have it back to us."

Weinberg further testified (44a):

"He told me he was in trouble. He had done something over the week-end, or the previous week; he had lost some money and he needed it."

The Referee based his decision that petitioner is in present possession or control of the bankrupt's money upon two factors, namely: (1) "Possession in Pagano has been established as late as March 31 of this year, less than three months ago. * * * This is 'inference from yesterday's possession' which is entirely permissible under the doctrine of *Maggio* v. *Zeitz*, 333 U. S. 56" (88a); and (2) "Pagano had the burden to come forward and explain what he did with the money * * * Refusal to answer on the ground it will incriminate him does not relieve him of the burden to explain" (89a).

Whether an inference should be made from recent possession of a bankrupt's property depends upon whether the property is readily disposable, such as the money loaned to petitioner in this case, and whether the person who received such property is a "fast living adventurer using the proceeds to make up the difference between income and outgo." *Maggio* v. *Zeitz*, 333 U. S. 56, 66.

In the latter case, "such acts, however reprehensible," do not "warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow." *Maggio* v. *Zeitz*, 333 U. S. 56, 64; *In re Rosser*, 101 Fed. 562, 566.

The turnover order in this case has precisely this effect. The Referee himself said, "Evidently these people can spend it overnight. I could not" (52a), thus recognizing that the petitioner no longer had the money, and could not comply with an order to turn it over to the trustee. Yet, the Referee found that the petitioner had possession or control of the money, not because there was evidence to that effect, but because he had obtained the money by what the Referee deemed an "unlawful raid on the funds of the bankrupt" (88a), and because of his "refusal to testify as to what he did with the money" (88a).

Even where "the property and its proceeds have already been dissipated" by conduct which "may be a crime", it would, nevertheless, "be a flagrant abuse of process" to issue a turnover order "to exert pressure on friends and relatives to ransom the accused party from being jailed." *Maggio v. Zeitz, supra,* 333 U. S. 56, 64; *Freed* v. *Central Trust Co. of Illinois,* 215 Fed. 873, 877.

In *Oriel* v. *Russell,* 278 U. S. 358, this Court said that while a turnover order is coercive and enforceable by contempt proceedings, it may not be used for purely punifive purposes, where there is no present ability to comply with the turnover order.

In the *Maggio* case, *supra,* this Court said that "to jail one for a contempt for omitting an act he is powerless to perform would . . . make the proceeding purely punitive." 333 U. S. 56, 72.

The turnover order is *res judicata* and precludes a subsequent claim by the debtor that he lacked ability to comply therewith at or before its issuance. *Oriel* v. *Russell, supra,* 278 U. S. 358, 365. In opposition to a motion to punish him for contempt for non-compliance with the turnover order, "the only evidence that can be considered is the evidence of something that has happened since the turnover order was made showing that since that time there has newly arisen an inability on the part of the bankrupt to comply with the turnover order." *Oriel* v. *Russell, supra,* 278 U. S. 358, 363.

On June 1, 1962, the attorneys for the trustee notified petitioner's attorney that they would make a motion to punish the petitioner for contempt for non-compliance with the turnover order.

Unless petitioner's ability to comply with the turnover order is decided in this proceeding on the basis of actual

evidence, instead of an inference founded on his possession thereof more than three months before the turnover order was made, and on his refusal, on grounds of self incrimination, to explain what he did with the money when he had it three months before, he will be limited, in the prospective contempt proceeding, to evidence of inability to comply caused by events that occurred subsequent to the issuance of the turnover order, which would, in effect, preclude him from showing that his inability to comply occurred before, rather than after the issuance of that order.

II

The Referee decided that the petitioner "had the burden to come forward and explain what he did with the money" (89a); that his "Refusal to answer on the ground it will incriminate him does not relieve him of the burden to explain" (89a); and that his "refusal to testify", together with his possession of the money "less than three months ago", makes it "a fair and reasonable inference" that the petitioner "is presently in possession or control thereof" (89a).

The Referee cited the *Maggio* case, *supra*, in support of this statement. But Maggio did not claim a privilege against self incrimination, and this Court's decision in that case did not consider or decide whether any inference of present possession of a bankrupt's property can be made from a claim of a privilege against self incrimination.

The Court of Appeals noted but did not decide "whether or not an inference could be drawn from his doing so in a proceeding of this sort", but it went on to decide that petitioner's "claim that testimony would incriminate him cannot be transformed into a plausible assertion of innocence in the acquisition of the monies or an adequate denial

of continued possession of them", citing *Dittmar* v. *Michaelson*, 281 Fed. 116, 119, certiorari denied, 260 U. S. 738.

But such "denial of certiorari has no precedential significance." *In re Luma Camera Service*, 157 Fed. 2d 951, 954.

This Court has not decided in any case that a claim of a privilege against self incrimination does not relieve a witness of a burden to explain whether he still has property of the bankrupt, or what he has done with it, or whether he can comply with an order to turn it over to a trustee in bankruptcy.

This Court has held, however, that while a custodian of records of a corporation or association has no privilege against self incrimination that relieves him of a legal obligation to comply with a subpoena *duces tecum* that requires him to produce such records, he does have a constitutional privilege against self incrimination by his own oral testimony as to the location of records which he did not produce, and which he swore he did not presently have in his possession. This Court said that "forcing the custodian to testify orally as to the whereabouts of non-produced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment." *Curcio* v. *United States*, 354 U. S. 118, 128.

Here, too, the inference of present possession or control of the money, founded on petitioner's claim of the privilege against self incrimination upon his refusal to answer questions as to what he did with the money when he had it, and the decision of the Court of Appeals herein that such claimed privilege is not "an adequate denial of continued possession" of such money, in effect, compels the petitioner to convict himself out of his own mouth, in view of the criminal charge of concealment of the bankrupt's

property that was made against him shortly after the bankruptcy. Petitioner thus faces the hard choice of using his privilege against self incrimination and being penalized therefor in this turnover proceeding and in the contempt proceeding to follow, by a decision that he had not made an adequate denial of continued possession of such money, when he refused, on grounds of self incrimination, to explain what he had done with it, or avoiding civil jail by giving the requisite explanation and thereby furnishing evidence that can be used to convict him of a charge of concealing property of the bankrupt corporation.

In *Morrison* v. *California*, 291 U. S. 82, 90-91, this Court said that there may be "a transfer of the burden" where "the evidence held to be inculpatory has at least a sinister significance", or where there is "in any event a manifest disparity in convenience of proof and opportunity for knowledge".

Here, petitioner's possession of the money three months before the turnover order was made, has no sinister significance that would support an inference that he still possesses it three months later. The shifting of the burden to the petitioner creates a manifest disparity in convenience of proof, by compelling him either to give up his privilege against self incrimination, or to have his present possession and control of the bankrupt's money, and his present ability to comply with an order to turn it over to the trustee in bankruptcy determined on the basis of an inference founded on his claim of such privilege.

In *Slochower* v. *Board of Higher Education*, 350 U. S. 551, 557, this Court said that it "must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment", and that "no inference of guilt was possible from the claim" of a privilege against self incrimination in that case.

Here, the Referee and the Court of Appeals have inferred, in effect, that the petitioner is retaining present possession of the bankrupt's money, from his claim of the privilege against self incrimination in refusing to answer questions as to his disposition of such money.

III

The Referee exceeded his jurisdiction in his decision that petitioner's claim that he borrowed the money from the bankrupt corporation was colorable. Petitioner's claim was supported by documentary evidence consisting of the promissory notes that he signed, and the entries in the books of the corporation, made by its Secretary-Treasurer and by its bookkeeper (18a-44a). It was also supported by the oral testimony of the petitioner and of the said Secretary-Treasurer, who testified in some detail, that his father, Joseph Weinberg, and Mickey Newman, who, through their wives as nominees, owned two thirds of the shares of the corporation, while the petitioner owned the remaining shares, expressly authorized him to approve the checks drawn on the corporation's bank accounts to petitioner's order as loans for which petitioner gave his promissory notes (62a-71a). This documentary evidence and oral testimony was not contradicted by any documentary evidence or oral testimony. Nevertheless, the Referee rejected all such evidence as incredible, and decided that the loans were colorable.

In thus rejecting petitioner's claim, solely on the basis of credibility, the Referee exceeded his jurisdiction, which was limited to "the duty to examine a claim adverse to the bankrupt estate to the extent of ascertaining whether the claim is ingenuous and substantial." *Cline* v. *Kaplan*, 323 U. S. 97, 99.

Where the property is in the actual or constructive possession of the bankruptcy court, it may summarily adjudi-

cate rights and claim thereto. *Thompson* v. *Magnolia Co.*, 309 U. S. 478, 481.

Here, however, the money is not in the actual or constructive possession of the bankruptcy court. Petitioner obtained possession thereof by checks drawn on the corporate accounts, with the consent of all the officers, directors and stockholders of the corporation.

The trustee's contention that such withdrawal of money from the corporation was fraudulent as to its creditors does not restore to the corporation title to the money in advance of adjudication of fraud in a plenary suit therefor, because in a turnover proceeding "an actual claim may be adverse and substantial even though in fact fraudulent and voidable.'" *Harrison* v. *Chamberlin*, 271 U. S. 191, 194.

The fact that the petitioner was an officer of the bankrupt corporation does not give the bankruptcy court jurisdiction to determine summarily the merits of his adverse claim. *Slenderella Systems* v. *Pacific T. & T. Co.*, 286 Fed. 2d 488, 490; *Ford* v. *Magee*, 160 Fed. 2d 457; *In re Wire Corporation*, 131 F. Supp. 586.

We have not found any other reported case in which a claim that money was borrowed from a bankrupt with his consent, was summarily rejected by a bankruptcy court in a turnover proceeding, at the request of a trustee in bankruptcy, upon his claim that the transaction defrauded the bankrupt or his creditors.

Where a person is holding money or property as agent or fiduciary for the bankrupt, he will be directed summarily to turn it over to the trustee in bankruptcy, because he can only show that his possession thereof was on behalf of the bankrupt, and he cannot show any transaction with the bankrupt whereby he obtained a right to such property, as against the bankrupt. *May* v. *Henderson*, 268 U. S. 111.

But where an agent or fiduciary can show an actual transaction with the bankrupt on which he bases his own claim to some part of the bankrupt's money or property, the bankruptcy court will not, over his protest, summarily decide the merits of his claim in a turnover proceeding. *Galbraith* v. *Vallely*, 256 U. S. 46, 50. Thus, this Court held in the *Galbraith* case, *supra*, that although an assignee for the benefit of creditors was required by law to turn over to the trustee in bankruptcy all of the bankrupt's assets that came into his possession by means of the assignment, he could, nevertheless, retain the money that he claimed to be due him for his own disbursements and compensation as such assignee. This Court said that such an assignee "could not be proceeded against summarily for such disbursements and compensation over his protest duly made against that method of procedure." 256 U. S. 46, 50.

IV

The questions presented and discussed above are important in the administration of the bankruptcy laws, and they recur frequently. A turnover order, such as was made in this case, may be made in other bankruptcy cases upon the same kind of inference of present possession of the bankrupt's property and present ability to comply with an order that it be turned over to the trustee, based on refusal of a witness to explain what he did with such property and his claim of a privilege against self incrimination as the reason for such refusal; and there may be other cases in which corporate officers may be directed to turn over to a trustee in bankruptcy property or money of a bankrupt corporation which they received from it in a transaction to which all its directors and stockholders consented.

The decision of the Court below is believed to be erroneous, because it subjects the petitioner to civil imprison-

ment for non-compliance with an order with which he cannot comply, it bases its determination upon an inference that he has present possession of the bankrupt's property and that he has present ability to comply with an order to turn it over to the trustee in bankruptcy, it draws such inference from the fact of petitioner's claim of a constitutional privilege against self incrimination in refusing to explain what he did with such money when he had it, and it compels him either to have such inference drawn against him from his claim of such privilege, or to give up such constitutional right and make the requisite explanation though it may incriminate him. Finally, the decision herein exceeds the jurisdiction of the bankruptcy court by summarily disregarding the documentary and oral testimony that title to the money actually passed from the corporation to the petitioner as a loan evidenced by promissory notes, to which all the corporation's directors and stockholders consented, and summarily directing the petitioner to turn over such money to the trustee in bankruptcy, upon a finding that the transaction was fraudulent and colorable.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

VINCENT J. VELELLA
Counsel for Petitioner

MORRIS WEISSBERG
Of Counsel

Judgment

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of April one thousand nine hundred and sixty-two.

Present:

HON. CHARLES E. CLARK,
HON. CARROLL C. HINCKS,
HON. HENRY J. FRIENDLY,
Circuit Judges.

MILTON E. SAHN, as Trustee in Bankruptcy of MURRAY PACKING CO. INC., Bankrupt,

Petitioner-Appellant,

—against—

JOSEPH PAGANO,

Respondent-Appellee,

and

STANLEY WEINBERG,

Respondent.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the order of the Referee be and it hereby is affirmed in accordance with the opinion of this Court; with costs to the appellant.

A. DANIEL FUSARO
Clerk

Opinion in Circuit Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 292—September Term, 1961.

(Argued April 2, 1962 Decided April 25, 1962.)

Docket No. 27380

MILTON E. SAHN, as Trustee in Bankruptcy of MURRAY PACKING CO. INC., Bankrupt,

Petitioner-Appellant,

—v.—

JOSEPH PAGANO,

Respondent-Appellee,

and

STANLEY WEINBERG,

Respondent.

Before:

CLARK, HINCKS and FRIENDLY,

Circuit Judges.

Appeal by trustee in bankruptcy from an order of the District Court for the Southern District of New York, John F. X. McGohey, *Judge*, 200 F. Supp. 16 (1961), reversing an order of a referee which had directed appellee to turn over monies received from the bankrupt. Reversed.

HAROLD L. LIPTON (Booth, Lipton & Lipton) (Edgar H. Booth of Counsel), New York, New York, *for Petitioner-Appellant.*

SAMUEL D. PRESSMAN (Vincent Velella, Saul I. Radin, of Counsel), New York, New York, *for Respondent-Appellee.*

FRIENDLY, *Circuit Judge*:

Milton E. Sahn, trustee in bankruptcy of Murray Packing Co., Inc. (hereafter Murray or the bankrupt), appeals from an order of the District Court for the Southern District of New York, 200 F. Supp. 16 (1961), which reversed an order of Referee Herzog directing Joseph Pagano, president of Murray, to turn over to the trustee $745,000 admittedly received by Pagano from Murray within the month preceding the filing of the involuntary bankruptcy petition. This order was without prejudice to the plenary suit which the judge believed to be required. We reverse the order of the District Court and restore that of the Referee.

The summary turnover order is "a judicial innovation by which the court [of bankruptcy] seeks efficiently and expeditiously to accomplish ends prescribed by the statute." *Maggio* v. *Zeitz*, 333 U. S. 56, 61 (1948). The rules governing this remedy were authoritatively stated in Mr. Justice Sanford's opinion in *Harrison* v. *Chamberlin*, 271 U. S. 191 (1926): "* * * a court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the bankrupt estate, without the consent of the adverse claimant * * * However, the court is not ousted of its jurisdiction by the mere assertion of an adverse claim; but, having the power in the first instance to determine whether it has jurisdiction to proceed, the court may enter upon a pre-

liminary inquiry to determine whether the adverse claim is real and substantial or merely colorable. And if found to be merely colorable the court may then proceed to adjudicate the merits summarily * * *" An adverse claim is merely colorable if and only if "the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense."

Mr. Justice Sanford's statement suffices to show that a clearly baseless claim of fact no more gives the needed color than an equally baseless claim of law. *In re Meiselman*, 105 F. 2d 995, 998 (2 Cir. 1939), underlined that a mere assertion of fact is not enough; we said, referring to *Harrison* v. *Chamberlin*, *supra*, *May* v. *Henderson*, 268 U. S. 111 (1925), and other cases, "We do not interpret these decisions as requiring the holding that there is reasonable doubt from the claimant's own testimony alone, when it is disbelieved by the referee * * * A claimant cannot avoid a summary order by the very audacity of his claims of either fact or law. The referee must proceed to determine whether the adverse claim is 'plainly without color of merit and a mere pretense' on a proper weighing of the testimony considered in the light of the claimant's self-interest and a due consideration of existing law."

That is what the referee did here. He characterized the story unfolded before him on the petition for a turnover order, primarily in testimony of Stanley Weinberg, Secretary-Treasurer of the bankrupt, as "the most audacious raid on a treasury that I have ever encountered." In summary it was this:

Murray was a meat and poultry wholesaler in the Bronx. Pagano became associated with Murray in March, 1960, as a salesman. In December, 1960, he bought a third of its stock and became its president; the directors were Gussie Weinberg, Terry Newman, and himself. Until Pagano took-

over, Murray's purchases had averaged around $100,000 per week, and it was meeting its bills in a normal fashion. After Pagano's election as president, purchases and sales started a speedy upward course, the new sales being primarily to customers brought in by Pagano.

Between March 20 and March 29, 1961, Stanley Weinberg, on Pagano's instructions, drew various checks to Pagano's order which ultimately totalled $745,000. The first two, $50,000 each, were drawn on March 20 on the Royal State Bank of New York. When Weinberg came over to cash the checks, the bank, not having that amount in cash, drew its own check for $12,000 to Pagano and two checks, for $38,000 and $50,000, to the order of The First National City Bank which that bank cashed; Pagano's counsel conceded that Pagano received the $100,000 represented by the three checks. The Royal State Bank having advised that it would not honor checks drawn against uncollected funds, Pagano directed the opening of a new account at the Commercial Bank of North America where one of his customers kept its own balance, so that the bankrupt could draw immediately on deposits of the customer's checks; the Commercial Bank of North America was given a certified copy of an authorizing resolution purportedly adopted at a directors' meeting, which, Weinberg testified, had never occurred. The remaining $645,000 was drawn in 14 checks on the new account; Pagano admitted the receipt of this money. On each of three days three separate checks were cashed; not knowing exactly what drawable funds were in the account, Weinberg gave Pagano several checks so that he could get whatever was available. Meanwhile more than $400,000 in checks drawn to trade creditors remained unissued.

At the outset Weinberg acted simply on Pagano's demand, without discussion with anyone. Quite early in the game, however, he called his father, Joseph Weinberg, and

Micky Newman, husbands of the two ladies who were listed as stockholders and directors along with Pagano. Joseph and Micky "got very excited" but ended up telling Stanley to let Pagano "have what he needs and by the week-end he will have it back to us."[1] Stanley Weinberg "knew whatever he [Pagano] wanted I had to give it to him"—a knowledge which Pagano reinforced by "banging on the desk" and admonishing "'look, I am the boss. You just do what I tell you, and that's all there is to it.'"

Allegedly Pagano executed ninety-day notes for the amounts received, although circumstances created legitimate doubt whether the notes were in fact delivered prior to the bankruptcy. By April 4, 1961, when Murray executed an assignment for the benefit of creditors, accounts payable exceeded $1,300,000 and cash in the two banks was down to $3,000. Weinberg knew of no legitimate business purpose for the payments to Pagano and made no investigation of Pagano's ability to repay; Pagano told Weinberg "he was in trouble. He had done something over the week-end, or the previous week; he had lost some money and he needed it." When asked, at the hearing held on June 9, 1961, what he had done with the $745,000 concededly received from the bankrupt, Pagano refused to answer, as he had with respect to these and other questions when examined under §21-a on May 15, 1961, on the ground that an answer might tend to incriminate him.

On this record the Referee held that the claim of a loan was "frivolous, baseless and fictitious and is put forward in bad faith" and that, in the absence of any evidence that Pagano no longer had the money, the "inference from yesterday's possession," recognized in *Maggio* v. *Zeitz*, *supra*, 333 U. S. at 66, warranted a finding that Pagano still held the bankrupt's property. Accordingly, he directed

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1 Neither Joseph Weinberg nor Newman was called as a witness.

Pagano to turn over $745,000 within five days from service of an order, which he signed July 24, 1961.

The District Judge reversed, stating, 200 F. Supp. at 18, that "It is not for him [the referee], in a turn-over proceeding, to decide the merits of really controverted issues," with which we agree, and that "Pagano's defense, however improbable it may seem, is no more frivolous than that of the plaintiff [sic] in Ford v. Magee," 160 F. 2d 457 (2 Cir.), cert. denied, 332 U. S. 457 (1947), with which we do not. Very likely the general strictures against resort to turnover proceedings in the concluding portion of that opinion,[2] 160 F. 2d at 460, misled the judge into thinking the case decided more than it had. There the defendant, Magee, admittedly had a *bona fide* claim against the bankrupt; the issues were whether the general manager of the bankrupt had consented that Magee keep a certain check in payment of that claim and had authority to do so. Since there was nothing inherently improbable in Magee's testimony of consent by the general manager, whom neither side called, and much evidence that the directors had delegated wide authority to him, this Court concluded that Magee's claim could not be said to lack the needed color. However, another sentence in the opinion made it plain that mere assertions do not prevent a finding of lack of color; it said that Magee's denials that he knew the check was intended for the corporation "were patent, even childish, concoctions which the referee was right to disregard; and if the result depended only upon his finding that Magee knew that he was appropriating corporate funds, we should unhesitatingly affirm," 160 F. 2d at 459.

Here the result did depend only on the referee's finding that Pagano "knew that he was misappropriating corporate funds," and the referee was warranted in regarding

2 These are severely criticized, on very substantial grounds, in 2 Collier, Bankruptcy (Moore and Oglebay ed. 1961), ¶23.06, at pp. 484-485 fn.

the loan explanation as "patent, even childish, concoctions." Weinberg's uncontradicted testimony fairly shrieked of theft; it would be supererogation to dot the i's and cross the t's. Pagano offered nothing in opposition save the notes, whose term was itself inconsistent with Weinberg's testimony as to short-term accommodation and whose contemporaneous delivery was dubious. If proof of such delivery would have given the needed color, the judge would have been right in insisting on a full-scale proceeding; but it would not. A theft is no less a theft if the thief obligingly leaves a note in the cash drawer; like a higher tribunal, a referee may also recognize that "there comes a point where this Court should not be ignorant as judges of what we know as men," Mr. Justice Frankfurter in *Watts v. Indiana*, 338 U. S. 49, 52 (1949). Pagano was free to avail himself of the privilege against self-incrimination but—whether or not an inference could be drawn from his doing so in a proceeding of this sort, see 8 Wigmore, Evidence (McNaughton rev. 1961), §2272, at p. 439 & fn. 14—his claim that testimony would incriminate him cannot be transformed into a plausible assertion of innocence in the acquisition of the monies or an adequate denial of continued possession of them. *Dittmar v. Michelson*, 281 F. 116, 117 (3 Cir.), cert. denied, 260 U. S. 738 (1922). Pagano's story was quite as pallid as that held to lack sufficient "color" in *In re Weinreb*, 146 F. 243 (2 Cir.), cert. denied, 203 U. S. 588 (1906); it fits Judge Augustus N. Hand's phrase, "standardized forms of falsehood so often reiterated as to be neither credible nor interesting," *In re Abesbaum*, 70 F. 2d 628 (2 Cir. 1934). Accepting that "The Referee and the Court in passing on the issue under * * * a turnover motion should * * * require clear evidence of the justice of such an order before it is made," *Oriel v. Russell*, 278 U. S. 358, 363 (1929), we think this test was met.

The order of the District Court is reversed and that of the Referee is affirmed.